

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 PORTLAND DIVISION

4 ERIK MATTSON,)

5 Plaintiff,)

Case No. 3:18-cv-00989-YY

6 v.)

January 29, 2019

7 QUICKEN LOANS, INC.,)

8 Defendant.)

Portland, Oregon

9 _____)
10
11
12
13 TELEPHONIC DISCOVERY HEARING

14 TRANSCRIPT OF PROCEEDINGS

15 BEFORE THE HONORABLE YOUNG YIM YOUNG

16 UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
17
18
19
20
21
22
23
24
25

APPEARANCES

FOR THE PLAINTIFF:

JARRETT L. ELLZEY
Hughes Ellzey LLP
2700 Post Oak Blvd
Suite 1120
Houston, TX 77056

FOR THE PLAINTIFF:

S. AMANDA MARSHALL
S. Amanda Marshall LLC
4545 SW Angel Avenue
#104
Beaverton, OR 97005

FOR THE DEFENDANT:

W. KYLE TAYMAN
Goodwin Procter LLP
901 New York Avenue, N.W.
Washington, DC 20001

FOR THE DEFENDANT:

JAMES P. LAURICK
Kilmer Voorhees & Laurick, PC
732 NW 19th Avenue
Portland, OR 97209

COURT REPORTER:

Jill L. Jessup, CSR, RMR, RDR, CRR
United States District Courthouse
1000 SW Third Avenue, Room 301
Portland, OR 97204
(503) 326-8191

* * *

TRANSCRIPT OF PROCEEDINGS

(January 29, 2019)

(Telephone conference:)

THE COURT: Good morning. This is Judge You. We're on the record in Mattson v. Quicken Loans. It's Case No. 18-cv-00989. Before we begin, let me make a couple of requests. As I mentioned, we're on the record. That means that we have a court reporter, and she's doing her very best to accurately record the proceedings. So what that means is that everyone needs to speak loudly and clearly and, if possible, slow the pace down a little bit to make sure that everything is captured. If you're on speakerphone, it makes things very difficult, so please switch to a handset. And also please identify yourselves before speaking so that the court reporter can accurately record who is saying what.

So, with that, let me ask if we have plaintiff's counsel on the phone.

MS. MARSHALL: This is Amanda Marshall for plaintiffs.

MR. ELLZEY: Good morning, Your Honor. Jarrett Ellzey for plaintiff.

THE COURT: All right. And how about for the defense?

(Simultaneous talking.)

THE COURT: I'm sorry. That was Mr. Laurick?

1 MR. LAURICK: Yes. Local counsel for Quicken,
2 Your Honor. Good morning.

3 THE COURT: And who else is on the line for Quicken,
4 if anyone?

5 MR. TAYMAN: This is Kyle Tayman for Quicken Loans,
6 Your Honor. Good morning.

7 THE COURT: Okay. Anyone else? Any other counsel on
8 the phone?

9 Okay. So, again, it sounded like at least one person was
10 on speaker, possibly, so be sure to speak loudly and clearly.

11 And, of course, to the court reporter, feel free to
12 interrupt at any time if you cannot understand what someone is
13 saying.

14 We're on the phone today at Quicken Loans' request. There
15 was an email that Mr. Laurick, I believe, had sent outlining a
16 matter with respect to a subpoena.

17 And in light of the fact, Mr. Laurick, it was your request
18 to meet with the Court today, do you want to outline what the
19 issue is?

20 MR. LAURICK: Your Honor, I'm going to defer to
21 Mr. Tayman, who's more familiar with the issues, Your Honor.

22 THE COURT: Okay. Mr. Tayman, go ahead.

23 MR. TAYMAN: Thank you, Your Honor. This is
24 Kyle Tayman for Quicken Loans. I'll just start with outlining
25 the issue. And feel free to cut me off, Your Honor, if you

1 would like to ask any questions. I appreciate that we have not
2 fully briefed this issue. We are hopeful that we can resolve
3 it today with your assistance, but we will be glad to submit
4 further briefing on it if you would like.

5 In short, Your Honor, the matter here -- that's here isn't
6 about a subpoena. It's actually about 23 subpoenas, by our
7 count.

8 It essentially boils down to this: As you're aware,
9 Mr. Mattson has four separate lawsuits against four separate
10 defendants that have been severed after being initially filed
11 as one action. And what has happened in the course of
12 discovery is that Mr. Mattson, and why we're here today, is
13 maintaining that he can use Rule 45 subpoenas issued in the
14 other cases, not against Quicken Loans, to obtain discovery
15 from third parties without disclosing those third parties to
16 us, without putting those third parties on initial disclosures,
17 without giving Quicken Loans notice of these -- Rule 45 notice
18 of these subpoenas. And some of those subpoenas do violate the
19 Court's order, in our view, because they are not limited to
20 discovery only about Mr. Mattson. And that so long as he later
21 produces whatever he obtains from these third parties to
22 Quicken Loans, then all of that is compliant with the federal
23 rules and that somehow this third-party discovery is effective
24 against Quicken Loans in this case.

25 When I say "later produced," in our review, some of these

1 docket -- some of these subpoenas we got notice of 70 days
2 after they were issued.

3 So that is the framing of the dispute and why we're here,
4 and I would be glad to talk about some of the more specifics if
5 Your Honor would like to hear it.

6 All right. Thank you, Counsel. Let me hear from the
7 plaintiffs. I also would like to note that I received the
8 letter that Ms. Marshall sent to the court dated January 28th.

9 MS. MARSHALL: Thank you, Your Honor. This is
10 Amanda Marshall for the plaintiff, and I think our response is
11 largely laid out in the records, but I am trying to understand
12 the specific objection, which seems to me that when the
13 plaintiff is investigating the actions that we have pending
14 against separate plaintiffs that we need to inform each of the
15 plaintiffs of our investigation.

16 The problem here is that when the -- you know, we argued
17 from the beginning -- and I wasn't here, so I'm relying on the
18 record. And, please, everybody correct me if I'm incorrect.
19 But my understanding of the record is, as stated by defense
20 counsel, this case was originally brought as a combined action,
21 and defendant then objected to the combined action, claiming
22 that each of these were completely separate and there was no
23 connection whatsoever.

24 Plaintiff had maintained from the beginning that it was
25 our theory of the case that the leads came from a single

1 robocall, a single AVATAR call. So it was received by our
2 client. And that call was the nexus of the generation of the
3 claim and the leads for each of the defendants.

4 Defendants denied that emphatically, and that was, as I
5 understand it, the basis for the argument of severance, which
6 we objected to.

7 Nevertheless, the cases were severed, and we proceeded
8 against each person individually. Of course we had -- we
9 didn't have the evidence. It was our belief that the claims
10 were connected, but we didn't -- we were seeking evidence
11 during discovery and through those subpoenas. It's our
12 contention that we can subpoena anybody and any corporation and
13 any documents that we believe are relevant to the proceedings
14 that are initiated by plaintiff.

15 In the course of our collecting documents through the
16 process of subpoena under Rule 45, we actually obtained
17 confirmation that the theory that we had of the case is, in
18 fact, accurate. All of the claims were generated by a single
19 AVATAR. The clients -- I'm sorry, the defendants have all --
20 had the same nexus of all of these leads.

21 But the problem is that the times that we issued the
22 subpoenas Quicken Loans had been nonresponsive to our request
23 about the leads. The only thing that they had said -- the only
24 thing that they had identified in the initial disclosure was
25 that they got their leads from, quote, QuinStreet, and that was

1 the extent of their disclosure.

2 So our client was on his own trying to discover the source
3 of these leads by sending out subpoenas to various sources.
4 And because the defendants had insisted that the cases be
5 severed and that the discovery be separated, that is how we
6 proceeded. Given the fact that the cases are related and the
7 leads all came from the same place and we've discovered the
8 nexus of the Quicken Loans leads, not from Quicken Loans being
9 responsive to our request but from our independent
10 investigations and subpoenas sent out searching for Quicken
11 Loans leads that have gone to third parties, as was stated by
12 the defendants, we now know what happened, and they are
13 connected. And I can understand why defense counsel is
14 concerned that they didn't get that information in advance, but
15 I would just suggest to the Court that that was a result of
16 their own insistence that the cases be severed.

17 At this point what we proposed to Quicken Loans and our
18 consultation with them leading up to their request for this
19 hearing was if they would like to consolidate discovery, we
20 were -- are more than happy to comply with that. That would be
21 our suggestion.

22 At this point, they have received all of the information
23 that has been produced through the subpoena process. We are
24 happy to keep all of the parties in the loop. We are happy to
25 serve every party copies of all subpoenas that are served on

1 any of the remaining defendants in the case moving forward. We
2 have nothing to hide. (Indiscernible.) We're pleased to
3 proceed in whatever way the Court sees fit, but we -- we're
4 certainly wanting to give all of this information to Quicken.

5 In terms of whether or not we can use information that is
6 sought from third parties in the subpoena process, and what
7 our -- what our obligations are, in terms of disclosure, when
8 it comes to trial, I feel like the defense is conflating the
9 issue of pretrial discovery and admissibility at trial.

10 We can -- I mean, my understanding, and, you know, 30
11 years of being a trial lawyer in state and federal court in
12 Oregon is if I find a document on the street or get it from my
13 neighbor and it has to do with Quicken Loans, I can use it
14 against them as long as it's produced in a timely manner,
15 authenticated at trial, and admissible under the Federal Rules
16 of Evidence. I'm a little confused about the conflation of the
17 issues of admissibility and relevance for use against
18 Quicken Loans and sources of documents.

19 Again, I've offered counsel the option of being copied
20 contemporaneously on every subpoena that's issued so that if
21 they feel they have some kind of issue or privacy or privilege
22 about a document or a witness being sought from a third party,
23 they have the opportunity to file a motion to quash. And that
24 would seem to address the -- I guess I would just describe them
25 as the fairness issues that they're raising, in terms of, you

1 know, this idea that they're being blindsided by our
2 investigation.

3 But, again, we're happy to have discovery consolidated to
4 be another solution, which we, of course, offered to counsel
5 during our conferral.

6 THE COURT: All right. I have a few questions. One
7 question has to do with the paragraph on page 2 of
8 Ms. Marshall's letter where it says that it's clear -- now
9 clear that the lead was created within a minute of the AVATAR
10 call on September 1, 2017. So I don't have the benefit of all
11 of the information that the parties now have. Also, on -- I'm
12 sorry. That was on page 3.

13 On page 2 it says defendants have conceded that they all
14 obtained the lead for Mattson from the same source at the exact
15 time -- same time Mattson received the AVATAR phone call.

16 So could somebody describe what the discovery -- what the
17 discovery has produced in that regard?

18 MS. MARSHALL: Your Honor --

19 UNIDENTIFIED SPEAKER: Your Honor --

20 THE COURT: Hold on. Hold on. Why don't we start
21 with Ms. Marshall, and then if you want -- if the defense would
22 like to fill in some details, then I'll hear from them as well.

23 MS. MARSHALL: If I may, Your Honor, I'll defer this
24 to Mr. Ellzey because he has more specific knowledge about
25 the -- what the discovery documents say.

1 THE COURT: Okay. So, Mr. Ellzey, go ahead.

2 MR. ELLZEY: I'm happy to do that, Your Honor.

3 What we discovered over the course of discovery in the
4 four actions is that the defendants all obtained the lead from
5 a broker named QuinStreet.

6 QuinStreet, we believe, obtained the original lead source
7 of information from an operation out of Florida named Save Big
8 Leads. Save Big Leads purports to operate minutemortgage.com,
9 which Mr. Mattson's wife supposedly logged onto and entered her
10 information through.

11 The discovery that we have obtained appears that this lead
12 information is really inaccurate. It's not her actual email
13 address. The IP address is incorrect. And the AVATAR call
14 came to Mr. Mattson's phone apparently the same time that -- or
15 one minute after Ms. Mattson was allegedly entering her
16 information into this minutemortgage.com website.

17 So our theory is that the AVATAR itself actually -- they
18 have the contact information some other way, through some other
19 method. It didn't actually come through the Minute Mortgage
20 website. The AVATAR call was triggered at the same time the
21 lead forwarded to the QuinStreet entity.

22 THE COURT: All right. Thank you.

23 And can you explain again -- can you remind me again what
24 your theory is with respect to each of the defendants?

25 MR. ELLZEY: Well, the theory is that --

1 THE COURT: Actually, Mr. Ellzey, I'm sorry. Just
2 with respect to Quicken Loans.

3 MR. ELLZEY: Well, we believe Quicken Loans -- and I
4 believe the evidence at this point shows Quicken Loans
5 contracted with QuinStreet. QuinStreet is a lead broker, and
6 QuinStreet gets the leads that it sells from a number of
7 sources. We believe the Mattson lead came to QuinStreet via
8 this Save Big Leads operation in Florida, which operates this
9 minutemortgage.com website allegedly.

10 So everything is being funneled through this QuinStreet
11 organization, if you will.

12 THE COURT: Okay. And then, remind me, other calls
13 were -- were made from -- allegedly made from Quicken to -- to
14 the Mattsons?

15 MR. ELLZEY: Correct, Your Honor.

16 THE COURT: Okay. It's been some time since I've
17 reviewed the facts here. Okay. So the -- just bear with me.
18 The theory is that the defendants obtained the lead from
19 QuinStreet Street, and then thereafter contacted the Mattsons;
20 is that correct?

21 MR. ELLZEY: Yes, Your Honor.

22 MS. MARSHALL: Yes.

23 THE COURT: All right. Just one moment.

24 The other question I have is -- and this is for
25 plaintiff -- why -- who -- when these 20-some-odd subpoenas

1 were issued, who was notified pursuant to FRCP 45(4)? Which
2 defendants were notified?

3 MR. ELLZEY: The defendants in the actions from which
4 the -- I'm sorry. This is Jarrett Ellzey. The defendants from
5 which the actions -- the subpoenas were issued.

6 THE COURT: Specifically, who would that be?

7 MR. ELLZEY: Okay. So if -- if we wanted to
8 investigate an entity under the New Penn action, for example,
9 pursuant to Rule 45, plaintiffs would have notified New Penn,
10 since they are the defendant and opposing party.

11 Now, what Quicken is saying is that we should have
12 notified them too, but -- even though they're not a defendant
13 in the New Penn case.

14 That was our practice up until Quicken and New Penn
15 expressed concern. We had the phone call and exchange of
16 emails, and I actually personally assured New Penn counsel -- I
17 believe I may have also done the same with Mr. Tayman. If I'm
18 incorrect, then somebody, I believe, on my team did, that we --
19 we would, from that point forward, copy all defendants whenever
20 a subpoena went out. That means in all of the related actions.

21 THE COURT: And so when these 23 subpoenas went out,
22 was New Penn the only defendant who was notified of those
23 subpoenas?

24 MR. ELLZEY: No, Your Honor. There were subpoenas
25 originated in the Vision Quest action and United Mortgage and,

1 I believe, Quicken also. In other words --

2 THE COURT: I'm sorry. Go ahead.

3 MR. ELLZEY: I'm sorry.

4 THE COURT: No, go ahead.

5 MR. ELLZEY: The subpoenas originated in all four of
6 the actions.

7 THE COURT: And who were the 23 subpoenas directed
8 to? You don't have to list all of the entities, but just give
9 me some idea.

10 MR. ELLZEY: Thank you. I wouldn't have been able to
11 do that. But they are -- they are mainly entities related to
12 the website hosting and -- and entities that may have obtained
13 information from the -- from the website hosting and data lead
14 generation from the Save Big Leads entity.

15 THE COURT: All right. Let me ask -- I want to give
16 an opportunity for the defense to address any of those things
17 that the plaintiffs have just represented.

18 MR. TAYMAN: Thank you, Your Honor. Kyle Tayman
19 again for Quicken Loans.

20 I do want to address several things. I think there were
21 several inaccuracies and falsities said there, and I understand
22 the sum of it is there's a lot of things going on in --

23 THE COURT REPORTER: I'm sorry. You're cutting out.

24 DEPUTY COURTROOM CLERK: Your Honor?

25 THE COURT: Mr. Tayman, you're cutting in and out a

1 little bit.

2 DEPUTY COURTROOM CLERK: Thank you.

3 MR. TAYMAN: Sure. Is that better? It sounds like
4 if someone could mute their background, that might resolve the
5 issue.

6 THE COURT: Okay. Go ahead.

7 MR. TAYMAN: I did receive Ms. Marshall's letter from
8 my colleague this morning. I was not copied on it last night.
9 I do think what she said is not factually correct -- that
10 Quicken Loans did not disclose the source of the leads. We
11 100 percent complied with our disclosure obligations pursuant
12 to the Court's scheduling order, and we answered all the
13 discovery that was asked of us. We disclosed that the lead, to
14 our knowledge, came from QuinStreet, because that's what we
15 knew. We later disclosed, once we did further factual
16 investigation and there was third-party discovery from
17 QuinStreet, that we understood it came through this website
18 Minute Mortgage group. So that is not in any way an excuse for
19 not getting us notice of these subpoenas.

20 The fundamental issue here is if the documents came from
21 these subpoenas and the subpoenas themselves are not being
22 issued in our lawsuit. So even after we have raised this
23 issue, there's been, I believe, six or seven new subpoenas
24 issued. Some of these concern Quicken Loans. Some of the
25 subpoenas, even the past subpoenas, they said that they didn't

1 copy us or they didn't issue in our case because we didn't
2 disclose (indiscernible). Subpoenas specifically asked for
3 documents about Quicken Loans.

4 So they're clearly issuing subpoenas in other cases
5 against third parties to get documents about my client which
6 can have no legitimate basis for the lawsuit against New Penn
7 or Vision Quest.

8 So Ms. Marshall said now that we're getting copied on
9 these subpoenas, that's all that they're doing. They're
10 issuing subpoenas in Vision Quest. For example, about
11 two weeks ago they issued five subpoenas, including to third
12 parties that are known business partners of Quicken Loans,
13 asking for documents that greatly exceed the scope of
14 Mr. Mattson's claims that are not limited to the time period in
15 question for Mr. Mattson and can go beyond his issues into
16 class certifications issues and for which they had not
17 disclosed how they're at all relevant to the case for
18 Mr. Mattson at Quicken Loans. And they're saying because we're
19 copied on it we somehow have sufficient notice.

20 Now Ms. Marshall said I can move to quash it. That's not
21 true. I can't move to quash a subpoena not in my case. If I
22 brought that to you, Your Honor, you would have no authority to
23 quash a subpoena that I'm bringing to your attention that I
24 received notice of if it was not issued in my case. That gets
25 to the fundamental problem here.

1 You know, we've received only -- notice of only nine of
2 the 23 subpoenas, and only one of the 23 that actually have
3 been issued in our case. So we're fundamentally handcuffed
4 from being able to do anything.

5 You know, Mr. Ellzey mentioned these subpoenas have been
6 issued in other cases. In some instances, they've issued --
7 they subpoenaed the same third party in multiple cases,
8 including from QuinStreet. So they're clearly capable of
9 issuing multiple subpoenas to -- in order to provide the
10 Rule 45 required notice so that we would have the opportunity
11 to then object and move to quash, if we were given that chance,
12 but they haven't been doing that.

13 Instead, you know, there are subpoenas here that we're
14 getting 78 days after it's issued, 64 days after it's issued,
15 53 days after it's issued.

16 Save Big Leads, for example, we got notice of it 64 days
17 after that subpoena was issued in the United Mortgage case. It
18 was not issued in our case.

19 Plaintiff disclosed Save Big Leads as potentially relevant
20 to their claims in this lawsuit. It makes no sense why -- if
21 they're being discovered from that entity that they're going to
22 then turn around and say it's applicable in their case against
23 Quicken Loans, why we wouldn't have Rule 45 notice of that and
24 the opportunity to object.

25 If anything, it seems like this was constructed to limit

1 Quicken Loans' participation, because, again, it's the only
2 defendant that has gotten one subpoena. Every other defendant
3 has gotten notice of multiple subpoenas or issued multiple
4 subpoenas in their cases.

5 Now, Your Honor, there's a few other things that I do want
6 to address. As to the AVATAR, I do understand that's the
7 plaintiff's theory. We haven't seen a connection to that, but,
8 you know, it gets back to the whole point why we severed. I do
9 want to make sure to remind the Court, because, again, I think
10 this wasn't quite right from Ms. Marshall's letter. You know,
11 at the May 18th hearing on that issue the plaintiff conceded
12 that severance was an appropriate course of conduct because, at
13 the end of the day, their claims are about calls.

14 So whatever the source of how everyone got their number,
15 Mr. Mattson's claim concerning the calls and of course the
16 calls my client made and what was said during those calls is
17 not relevant to the calls that New Penn made to Mr. Mattson.

18 I think also, Your Honor, just to be helpful to identify
19 some of the explicit examples of other things that are going on
20 here, the most five recent subpoenas that I mentioned, those
21 were issued in the Vision Quest case. We have been told for
22 the past two or three weeks that plaintiff has reached a
23 settlement with Vision Quest.

24 Now, I understand the settlement is apparently not
25 finalized, but that also just highlights our concern that we

1 are being copied on subpoenas in other cases for which they're
2 seeking discovery from Quicken Loans' business partners, like
3 LendingTree, that they're telling us that they're going to use
4 in our case, and they're issuing in a case where the defendant
5 apparently has a settlement agreement, in principle, and has no
6 incentive to police those subpoenas. And because they're not
7 issued in our case, I have no standing to move to quash them on
8 behalf of my client.

9 So we're kind of at a loss about what to do.

10 As Mr. Ellzey said, we -- we've had conferences. We wrote
11 letters. We had local counsel -- pursuant to Your Honor's last
12 advisement, we had local counsel try to resolve it, and we have
13 gotten no assurances that they're going to start complying with
14 the rules. If anything, all they've done is started to cc us
15 on the subpoenas going out in the other cases, which doesn't
16 give us adequate Rule 45 notice and doesn't make them
17 applicable in the case against Quicken Loans.

18 So we're kind of at a loss. And our position is that, you
19 know, this is not complying with Rule 45. The scope of
20 subpoenas are not complying with the Court's scheduling order.
21 They still have not -- despite issuing these 23 subpoenas to 16
22 different entities and saying that they're applicable in the
23 case against us, they still have not obtained additional
24 disclosures to identify these parties to us. For instance,
25 when I look at this laundry list of third parties, only two of

1 them were on the disclosures. So the -- and I only learned
2 through telephone conferences why they subpoenaed a couple
3 others. Most of them, I have no idea what -- why they're
4 subpoenaing those entities, how that discovery is supposed to
5 be relevant in our case, and what my client should be doing to
6 investigate or to try to participate in the conferences of
7 these third parties so we know that discovery being obtained
8 complies with this Court's order and is relevant. We're just
9 being denied our due process in all sense of the word.

10 THE COURT: All right, Counsel. Thank you.

11 So I've heard from both sides, and I -- after receiving
12 the letter this morning that Ms. Marshall sent, I had a chance
13 to do a little bit of research.

14 I'll just say I'm -- I'm a bit troubled by what I'm
15 hearing. Let me preface that by saying that I haven't heard
16 anything today that leads me to conclude that the decision to
17 sever these cases was in any way a mistake or inappropriate
18 under the circumstances. So that's the situation that we're in
19 right now.

20 I'm also -- I guess, when I say "troubled," I'm just
21 perplexed as to why subpoenas are being issued. But pursuant
22 to Rule 45(4), notice hasn't been provided to Quicken Loans,
23 although the subject of the subpoenas appears to be related to
24 this lawsuit against Quicken Loans and to material related to
25 Quicken Loans.

1 The research that I've done makes it very clear that under
2 Rule 45(4) proof of service has to be made on the other party.
3 And the purpose of the rule, which is set forth in the
4 committee note to the 1991 amendments, says that the
5 requirement of prior notice is to afford other parties an
6 opportunity to object to the production or inspection, and
7 that's just simply not what's being afforded to the defendant
8 in this case.

9 There's other language that I found in cases involving
10 this particular issue: The lack of notice on the opposing
11 party. For example, the Court has said that the risks attached
12 to the misuse of the subpoena power are great. It compromises
13 the integrity of the Court's processes.

14 So this is clearly an issue that the Court -- courts
15 across the country have taken very seriously.

16 Now, on one final note, to adopt the plaintiff's position
17 on this -- on this issue would really be an end run around
18 Rule 45(4). It would totally circumvent the purpose of the
19 rule, and that's just not something that I can -- I can allow.

20 So, basically, my reading of the rule, as applied to this
21 case, is that Quicken Loans has to be served, pursuant to
22 Rule 45(4), with the subpoena to nonparties. So that's
23 essentially my ruling.

24 What's the next step?

25 Well, let me ask is there anything further that you need

1 from the Court today?

2 MR. ELLZEY: Your Honor, this is Jarrett Ellzey.
3 Just to clarify, we -- we have been copying the nonparty
4 entities or defendants since they raised the issue. That --
5 that's been our agreement. Our reading of Rule 45 initially
6 was that we were only required to copy the defendants in the
7 action from which the subpoenas were issued. And --

8 THE COURT: Let me just stop you there. If you are
9 intending -- if you're subpoenaing information that you intend
10 to use in the lawsuit -- if you're subpoenaing information in
11 the New Penn lawsuit, but really you intend to use it against
12 Quicken Loans or you're seeking information that you may very
13 well use in the other lawsuits, you have to provide notice
14 under (4). You have to serve it, provide notice and a copy of
15 the subpoena on each party. That means Quicken Loans.

16 There's just no way around it. Irrespective of whether
17 you have come to some kind of agreement with them since then,
18 what they're asking for right now is adherence to Rule 45(4).

19 MR. ELLZEY: Understood, Your Honor.

20 THE COURT: I mean, later, you're going to be in the
21 situation where you haven't complied with 45(4) and -- and the
22 Court very -- they may very well exclude that information
23 because Quicken Loans wasn't provided with notice, wasn't
24 served with a copy. That's kind of a -- that's kind of a risky
25 game to play.

1 MR. ELLZEY: I do understand your position,
2 Your Honor. I mean, it -- this was really borne out of the
3 interest of efficiency. I mean, we -- to -- these parties
4 would have had to issue four subpoenas apiece. It just -- our
5 belief was that as long as we timely produced the documents
6 received, then we were complying with the rule. And any
7 nonparty wouldn't be prejudiced by our use of the documents
8 with timely production -- long before we even take a deposition
9 in this case. That was our position. I understand the Court's
10 ruling, and we intend to abide by it.

11 THE COURT: I appreciate that.

12 I just want to, again, emphasize that the purpose of the
13 rule is to afford other parties an opportunity to object to the
14 production or inspection. And if that notice is not provided,
15 if the subpoena is not served, then that opportunity is
16 forgone. Irrespective of whether they can object later, that
17 opportunity is forgone. So that's where the -- that's where
18 the problem lies. All right?

19 MR. ELLZEY: Understood, Your Honor.

20 THE COURT: Okay. So what, if anything else, do we
21 have to discuss today?

22 MR. TAYMAN: Your Honor, this is Kyle Tayman for
23 Quicken Loans. I just want to say this to make sure the record
24 is clear in response to what Mr. Ellzey said. Quicken Loans
25 has not agreed to accept a copy or notice of subpoenas issued

1 in other cases. We've maintained that it has -- the subpoenas
2 in our case have to be issued in our case, and we have to get a
3 Rule 45 notice. Going forward, as a result of this issue, we
4 maintain that our position is that they don't cure these
5 problems, then we don't think any of that discovery can be used
6 in a case against us.

7 You know, I'm happy to meet with plaintiff's counsel and
8 hear them out on any potential solutions they may have or
9 efficiencies.

10 We have been complying with entertaining discussions of
11 that in the past. Happy to do so further. And if something
12 can't be worked out, then I would propose the parties to come
13 back to the Court and try to see if we can't figure something
14 out. But I would be hopeful we could resolve it.

15 THE COURT: Well, let me say one thing as a point of
16 clarification. I mentioned use of these materials at trial.
17 That is a -- I think a premature issue for the Court to
18 resolve. One, I'm not the trial judge. So that's a matter
19 that I'm not going to make any kind of a ruling about. That is
20 completely within the scope of the authority of the judge who
21 tries the case.

22 There are many, many other factual issues that may come
23 into play in making that type of decision, so I -- basically, I
24 don't want to touch that right now, but I am just pointing it
25 out because it shows the type of risk that is involved in not

1 complying with the rule. Okay?

2 MR. ELLZEY: Understood, Your Honor.

3 THE COURT: Okay. So anything further for today?

4 MR. ELLZEY: Nothing from the plaintiff.

5 MR. TAYMAN: Nothing further from us, Your Honor.

6 THE COURT: All right. And you did mention -- I
7 mean, if there's some matter that you need to return to the
8 Court about, well, then, by all means, feel free to do so, and
9 as you can see, we can schedule you quickly and conveniently.
10 You don't have to provide a lot of information in advance in
11 order for us to get this resolved.

12 And, of course, if I needed more information, I could
13 always ask for that at the time.

14 All right, then. Okay. Well, thank you very much.

15 MR. ELLZEY: Thank you, Your Honor.

16 MS. MARSHALL: Thank you, Your Honor.

17 MR. TAYMAN: Thank you, Your Honor.

18 MR. LAURICK: Thank you.

19 (Hearing concluded.)
20
21
22
23
24
25

C E R T I F I C A T E

Erik Mattson v. Quicken Loans, Inc.

3:18-cv-00989-YY

TELEPHONIC DISCOVERY HEARING

January 29, 2019

I certify, by signing below, that the foregoing is a true and correct transcript, to the best of my ability, of the telephonic oral argument heard via conference call, taken by stenographic means. Due to the telephonic connection, parties appearing via speakerphone or cell phone, speakers overlapping when speaking, speakers not identifying themselves before they speak, fast speakers, the speaker's failure to enunciate, and/or other technical difficulties that occur during telephonic proceedings, this certification is limited by the above-mentioned reasons and any technological difficulties of such proceedings occurring over the speakerphone at the United States District Court of Oregon in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/Jill L. Jessup, CSR, RMR, RDR, CRR, CRC

Official Court Reporter
Oregon CSR No. 98-0346

Signature Date: 1/31/19
CSR Expiration Date: 9/30/20